

CIVIL REVISION APPLICATION NO. 73 OF 2001

1. Smt. Sushila Sadanand
Borkar, major in age,
d/o Sadanand ladu
Borkar,
2. Smt. Nila Sadanand
Borkar, major in age,
d/o S. Borkar,
3. Kum. Shobha Sadanand
Borkar, major, d/o late
Sadanand L. Borkar,
4. Shri Devidas Sadanand
Borkar, major in age,
s/o late Sadanand
Ladu Borkar, all r/o
House No.335, Shrama
Safalya, Fatorda,
Margao, Salcete, Goa. ... Petitioners.

Versus

1. Smt. Maria Exaltacao
Vaz alias Elasso Vaz,
aged 70 years, married,
housewife and her
husband and
2. Shri Rosario Oliveira,
aged 75 years, s/o late
Constantino Oliveira,
both r/o House No.29,
Ilha de Rachol, Salcete,
Goa. ... Respondents.

Smt. A. A. Agni, with Shri N. Costa Frias, advocates
for the petitioners.

Shri Y. V. Nadkanri with Shri J. A. Cardozo,
advocates for the respondents.

CORAM: S. RADHAKRISHNAN, J.

DATE: 13th September, 2002.

ORAL JUDGMENT

By this Civil Revision Application the
petitioners, who are the original defendants have

challenged the Order dated 11th January, 2001, passed by the IInd Additional Civil Judge, Senior Division, Margao, in an application filed by the petitioners herein, under Order 7 Rule 11 of the Code of Civil Procedure, 1908, seeking rejection of the plaint. The learned Judge by the aforesaid Order dated 11th January, 2001 had declined to grant the said application and dismissed the same. Aggrieved thereby, the original defendants, namely the petitioners herein, have filed this Civil Revision Application.

2. This Civil Revision Application was admitted by this Court on 20th April, 2001 and the impugned Order was also stayed.

3. The above matter has a chequered history of over 32 years. On 20th November, 1970, an agreement for managing a bar-cum-restaurant, known as "Ratnadeep Lunch Home" was entered into between one Sadanand Ladu Borkar and Luis Vaz. the said Sadanand was a lessee of the premises wherein the said bar-cum-restaurant, was situated and the landlord was one Antonio Pereira. In the year 1975, the said Sadanand Borkar filed an eviction suit against Luis Vaz, contending that Luis Vaz was only allowed to manage the said establishment, namely the said bar-cum-restaurant Ratnadeep Lunch Home, on the ground that the said Luis Vaz had failed to pay compensation and

was also indulging in illegal activities like matka, etc. and also that the period of agreement had already expired. The above suit came to be disposed of by the Civil Court on 22nd December, 1978, holding that the Civil Court had no jurisdiction inasmuch as the matter involved was between a landlord and tenant and was governed by the provisions of the Rent Control Act. In view of the above finding given by the Civil Court, especially because the stand of the defendants in the said suit was that the said Luis Vaz was a tenant of Sadanand Borkar and as such the regular Civil Court had no jurisdiction to entertain the suit, the said suit was dismissed.

4. In view of the findings in the above civil suit, the said Sadanand Borkar filed a rent case before the Rent Controller in the year 1979. Before the Rent Controller, the said Luis Vaz took a stand that the relationship between him and Sadanand Borkar was not that of landlord and tenant and there was only an agreement to manage the said restaurant. The above contention of Luis Vaz was accepted by the Rent Controller and the Rent Case was dismissed on 13th October, 1980. Aggrieved thereupon, an appeal was preferred by Sadanand Borkar, which Appeal also came to be dismissed on 15th January, 1982.

5. In view of the above, Sadanand Borkar had to again file an eviction suit by way of Civil Suit on 25th November, 1982, contending that the relationship between Sadanand Borkar and Luis Vaz, was not that of landlord and tenant, but was only that of lessor and lessee. However, on 21st October, 1983, the said suit filed by Sandanand Borkar came to be dismissed by the Civil Court on the ground that the earlier finding recorded in the earlier suit operated as res judicata. In the meanwhile Luis Vaz died and his wife Ana Severina Monteiro e Vaz was brought on record. Subsequent thereto, a regular appeal was filed by Sadanand Borkar against the dismissal of the suit. Even the said appeal came to be dismissed by the lower Appellate Court on 11th June, 1987. Aggrieved thereby, the said Sadanand Borkar filed a Second Appeal before this Court. In the said Second Appeal on 19th April, 1990, certain consent terms were arrived at between Ana Severina and the legal representatives of Sadanand Borkar, as Sadanand Borkar had expired during the interregnum. The said consent terms were duly signed by Ana Severina and the legal representatives of Sadanand Borkar. Ultimately, on 24th April, 1990, this Court passed a consent decree in the light of the consent terms. In spite of the said consent decree Ana failed to deliver possession of the said Hotel Ratnadeep Lunch Home.

6. In the meanwhile, one Ubaldino had filed a civil suit in the year 1990 contending that he is the legal heir of Luis Vaz and also sub-tenant of Ana and had prayed that the consent decree should be treated as null and void. The said Ubaldino was able to obtain an ex parte injunction on 22nd August, 1990, whereby the petitioners herein were restrained from proceeding with the execution of the decree. Finally, the said ex parte injunction was vacated by the Civil Judge, Senior Division, Margao, by his Order dated 2nd July, 1993. The said Ubaldino filed an appeal against the said dismissal. Thereafter the said Ubaldino had filed an application in the execution proceedings which was dismissed by the Civil Judge, Senior Division, and later confirmed by the Additional District Judge, Margao. However, this Court in its revisional jurisdiction held that the application was maintainable. Finally, this application under Order 21 Rule 97 of the Code of Civil Procedure was adjudicated by recording evidence and by an Order dated 28th January, 1999, the same was dismissed. thereafter a regular appeal was filed against the said Order before the learned Additional District Judge, Margao, which appeal also came to be dismissed on 11th January, 2000. The matter was carried further to this Court by way of Second Appeal, which came to be dismissed on 15th March, 2000.

7. After all the aforesaid proceedings, in

the month of April, 2000, one Smt. Maria Exaltacao Vaz alias Ellassao Vaz and her husband have filed a suit before the Civil Judge, Senior Division. In the said suit the petitioners herein, who were the defendants in the said suit, had taken out an application on 7th June, 2000, contending that the plaint ought to be rejected, inasmuch as the respondents herein could not file a separate suit and could only file an application under Order 21 Rule 97 of the Code of Civil Procedure and such a separate suit to establish their right, title, interest, etc. in the said restaurant Ratnadeep Lunch Home was not maintainable at all. The learned counsel for the petitioners states that on 30th June, 2000 in execution of the aforesaid decree, the petitioners herein were able to take possession of the said bar-cum-restaurant Ratnadeep Lunch Home, from one Ramdas Brokar, who was present at the suit premises at that time. It is also the case of the petitioners that thereafter on 1st July, 2000, the petitioners found that the locks placed by them on the suit premises were broken and one Cajetan Oliveira and two others were present in the suit premises and also that the petitioners were threatened with dire consequences. In view thereof it appears that on 10th August, 2000, the petitioners herein have filed Regular Civil Suit for a mandatory injunction against respondents no.1 and 2, for removal of the locks and for possession. In the said suit on 26th September,

2000, a mandatory injunction was granted. Aggrieved thereby, an appeal has been preferred by the respondents, which has been admitted and stay has been granted. Thereafter the impugned Order dated 11th January, 2001, came to be passed by the learned IInd Additional Civil Judge, Senior Division, Margao, rejecting the application of the petitioners seeking the relief of rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure.

8. The learned counsel appearing for the petitioners, Mrs. Agni, brought to my notice that as per the scheme of Order 21 Rules 97 to 103 of the Code of Civil Procedure, no separate suit is permissible and all disputes pertaining to execution of a decree ought to be resolved by way of an application either under Order 21 Rule 97 or under Order 21 Rule 99 of the Code of Civil Procedure. In this context, it would be relevant to note the provisions of Order 21 Rules 97 to 103 of the Code of Civil Procedure, which read as under;-

"Order 21:

R.97. Resistance or obstruction of possession of immovable property.-

- (1) where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the

property, he may make an application to the Court complaining of such resistance or obstruction.

- (2) where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

98. Orders after adjudication.-

- (1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),-
 - (a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or
 - (b) pass such other order as, in the circumstances of the case, it may deem fit.
- (2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

99. Dispossession by decree-holder or purchaser.

(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. Order to be passed upon application complaining of dispossession. -

Upon determination of the questions referred to in rule 101, the Court shall in accordance with such determination, -

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

101. Question to be determined -
All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

102. **Rules not applicable to transferee pendente lite.-**
Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Explanation -

In this rule, 'transfer' includes a transfer by operation of law.

103. **Orders to be treated as decrees.-**
Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree."

9. Smt. Agni, learned counsel for the petitioners contends that the learned IInd Additional Civil Judge, Senior Division, Margao, had committed serious error of law by entertaining the above suit filed by the respondents herein and also by not allowing the application for rejection of the plaint filed by the petitioners herein. Smt. Agni contends that when there is an execution proceeding, and if a third party wants to claim an independent right, title, etc. the only remedy available to such a third party is to adopt proceedings either under Order 21 Rule 97 of the Code of Civil Procedure, if not dispossessed already, or if dispossessed then under Order 21 Rule 99 of the Code of Civil Procedure but cannot at all, resort to a separate

suit. Therefore, the contention of the learned counsel is that such a third party could only take recourse in the said execution proceedings by way of an application and cannot file a separate suit. The learned counsel also pointed out that in the said application the third party is entitled to set up the entire case leading evidence and the same will be determined as if it were to be a suit but no separate suit would be permissible. Smt. Agni contends that the provisions in Order 21 Rules 97 to 103 are a Code by themselves and are comprehensive to deal with all the issues and the Legislature has specifically provided and barred any separate suits and, as such, the learned Civil Judge ought not to have entertained the said suit and ought to have rejected the said plaint.

10. In that behalf, Smt. Agni, learned counsel brought to my notice a judgment of the Supreme Court in **Shreenath & Anr. vs. Rajesh & Ors.**, (1998) 4 SCC 543, especially paragraph 13 of the said judgment, the Hon'ble Supreme Court has held that any third party claiming to have an independent right can set up that right and agitate under Order 21 Rule 97 of the Code of Civil Procedure and he need not wait till he is dispossessed and therefore can file an application under Order 21 Rule 97 of the Code of Civil Procedure. In paragraph 13 of the aforesaid judgment, the Supreme Court

has clearly held that after the amendment of the Code of Civil Procedure, all disputes are to be settled by the executing court itself, finally under Rule 101. In paragraph 14 the Supreme Court has observed as under:-

"14. We find that both either under the old law or the present law, the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under Order 21 Rule 97 has to be decided by the executing court itself."

In paragraph 15 the Supreme Court has made it very clear that one need not wait for his dispossession to enable him to participate in execution proceedings. A person can object and get an adjudication when he is sought to be dispossessed by the decree-holder.

11. The learned counsel for the petitioners thereafter referred to another judgment of the Supreme Court in **Noorduddin vs. Dr. K. L. Anand**, (1995)1 SCC 242, wherein in paragraph 8 the Court has observed as under:-

"8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive

between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution."

12. Smt. Agni also referred to another judgment of the Supreme Court in **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal & Anr.**, (1997)3 SCC 694, wherein the Court has exhaustively analysed the scope of Order 21 Rules 97 to 103 of the Code of Civil Procedure, and the relevant paragraph in that behalf would be paragraph 9, which reads as under:-

"9. In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining to execution of the decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the executing court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order 21, Rule 97, sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21, Rule 35 with the help of

police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the executing court it is difficult to appreciate how the executing court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order 21, Rule 99 CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order 21, Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order 21, Rule 99. Order 21, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order 21, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest de hors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order 21 and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing possession and not before it if

he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order 21, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order 21, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the executing court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order 21, Rule 97 CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21, Rule 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all

finally resolved in execution proceedings themselves."

From the above dictum laid down by the Supreme Court, Smt. Agni contends that the statutory remedy for the decree-holder as well as the obstructionist will be to get a proper adjudication before the executing court and such an adjudication will be subject to the hierarchy of appeals and the same will be binding between the parties in that proceeding and a separate suit would be barred with a view to ensure that multiplicity and parallel proceedings are avoided and that Order 21 Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in the execution proceedings. Therefore, the learned counsel urged, that after analysing the above the Apex Court has in unequivocal terms held that no separate suit would lie and no parallel proceedings should be adopted and only an application either under Order 21 Rule 97 or under Order 21 Rule 99, as the case may be, can be adopted.

13. The learned counsel for the petitioners also referred to a judgment of the learned Single Judge of our High Court in **Ahmed Abdul Aziz Bengali vs. Mohammed Hanif M. Mulla & Ors.**, 2001 (Supp.) Bom.C.R. 813 wherein also this Court has, in clear terms, following the aforesaid judgments of the Supreme Court, held that a separate suit would be barred to avoid

multiplicity of proceedings and parallel proceedings and that Order 21 Rules 97 to 103 would remain a complete code and the sole remedy for the concerned parties is to have their grievances once and for all finally resolved in the execution proceedings itself.

14. Smt. Agni also referred to another judgment of the Supreme Court in **N.S.S.Narayana Sarma & Ors. vs. M/s Goldstone Exports (P) Ltd. & Ors.**, AIR 2002 SC 251, wherein the Supreme Court has analysed the various judgments dealing with Order 21 Rules 97 to 103 of the Code of Civil Procedure and has emphasized that any adjudication in such cases shall be by application which shall be determined by the court dealing with the application in execution and not be a separate suit. In fact, in paragraph 15 of the said judgment, the Supreme Court has emphasized that such adjudication on application shall be determined by the court dealing with the execution application and not by a separate suit.

15. Smt. Agni also referred to another judgment of the Supreme Court in **Silverline Forum Pvt. Ltd. vs. Rajiv Trust & Anr.**, (1998)3 SCC 723, wherein also the Supreme Court has held that in the adjudication process envisaged in Order 21 Rule 97(2) of the Code of Civil Procedure, execution court can decide the question raised by the obstructionist and the same will have to be

adjudicated by the said execution court. Therefore, the contention of the learned counsel for the petitioners is that no separate suit ought to be entertained and whatever objection the respondents herein may have, they are entitled to raise the same in execution proceedings by way of an application under Order 21 Rule 97 Code of Civil Procedure and the suit which is pending before the learned Civil Judge, Senior Division, Margao, ought not to be permitted to continue and that the plaint ought to be rejected.

16. Smt. Agni also pointed out that in the above matter that there is also an element of fraud as is apparent that the petitioners have been agitating from the year 1970 for almost 32 years to get back possession of the bar-cum-restaurant Ratnadeep Lunch Home. The learned counsel contends that time and again on some fictitious basis, proceedings after proceedings are being adopted to thwart the attempts of petitioner in succeeding to get the possession of the said premises. The learned counsel for the petitioners contended that this is apparent from the sequence of events as set out at the beginning of the above judgment. Therefore, the learned counsel for the petitioners contends that this Court ought not to show any leniency in case of such fictitious and fraudulent claims being made by the respondents herein.

17. The learned counsel for the petitioners contends that the respondent no.1, who claims to be the sister of Luis Vaz, was all throughout aware of all the earlier proceedings and now suddenly wakes up in April, 2000, to file the present suit claiming an independent right. The learned counsel contends that this fraudulent attempt ought not to be tolerated by this Court and the same ought to be nipped in the bud. In that context the learned counsel for the petitioners referred to a well-known judgment of the Supreme Court in **S.P. Chengalvaraya Naid (dead by L.Rs. vs. Jagannath (dead) by L.Rs. & Ors., (1994) 1 SCC 1**, especially paragraph 5 of the said judgment, which reads as under:-

" The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that 'there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence'. The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains

indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

18. Similarly, the learned counsel for the petitioners also referred to another judgment of the Supreme Court in **ITC Limited vs. Debts Recovery Appellate Tribunal**, (1988)2 SCC 70, to indicate that even misrepresentations would amount to a fraudulent conduct.

19. The learned counsel for the petitioners strongly refutes the suggestion of the respondents that an option is given to a third party either to file an application under Order 21 Rule 97 or to file a separate suit. The learned counsel contends that there is no such option. The only remedy available after the amendment is an application under Order 21 Rule 97, or an application under Order 21 Rule 99, as the case may be, but not a separate suit. The learned counsel for the petitioners contends that the above provisions as interpreted by the Supreme Court clearly indicates that a separate suit is expressly barred. Even if it were to be construed that there is no express bar, the same should be construed to the effect that there is an implied bar.

20. In that behalf, Smt. Agni, referred to a judgment of the Supreme Court in **Chandrakant Tukaram Nikam & Ors. vs. Municipal Corporation of Ahmedabad & Anr.**, 2002 AIR SCW 710, wherein the Supreme Court was

considering whether there is an implied bar when the remedy was available under the Industrial Disputes Act. In that behalf, the Supreme Court has observed as under:-

" In the aforesaid premises and having regard to the relief sought for in the suits filed in the Civil Court, we have no manner of hesitation to come to the conclusion that in such cases the jurisdiction of the Civil Court must be held to have been impliedly barred and the appropriate forum for resolution of such dispute is the forum constituted under the Industrial Disputes Act."

21. In the above facts and circumstances the learned counsel for the petitioners prayed that the impugned Order passed by the learned Civil Judge, Senior Division, Margao, be quashed and set aside and the above revision be allowed as the error committed by the learned Civil Judge, Senior Division, Margao, is patent and the same ought not to be permitted to continue.

22. Shri Nadkarni, learned counsel appearing for the respondents strongly opposed the above Civil Revision Application and contended that the learned Civil Judge, Senior Division, Margao, had not committed any error in holding that the application under Order 7 Rule 11 of the Code of Civil Procedure to be not maintainable as the suit was entertainable by the said Court. Shri Nadkarni emphasises that under the scheme of Order 21 Rules 97 to 103 of the Code of Civil Procedure, a third party has an option of resisting the execution

proceedings by making an application under Order 21 Rule 97 or under Order 21 Rule 99, as the case may be, or, in the alternative, without making such application either under Order 21 Rule 97 or Rule 99, the third party has a right to file a separate suit to establish his right, title and interest in the property. Shri Nadkarni fairly stated that once having exercised the right by filing an application under Order 21 Rule 97, or under Order 21 rule 99 of the Code of Civil Procedure, such a party cannot file a suit, i.e. such a third party cannot have two proceedings simultaneously, but is entitled to choose either to adopt an application under Order 21 Rule 97 or Rule 99, or may file a separate suit instead.

23. Shri Nadkarni contends that this very specific issue whether a separate suit would be maintainable inspite of Order 21 Rules 97 to 103 of the Code of Civil Procedure had been considered by two judgments of two different High Courts. Firstly, the learned counsel referred to a Division Bench judgment of the Andhra Pradesh High Court in **Pavan Kumar & Anr. vs. K. Gopalakrishna & Anr.**, AIR 1998 A.P. 247. In the said judgment the learned counsel for the respondents referred to paragraphs 8, 9 and 10, which read as under:-

"8. The first and foremost contention raised before us as well as before the learned Single Judge by the learned counsel for the appellants is that the suit is not maintainable in the

light of the provisions of Order 21, Rule 99 read with Rule 101 C.P.C.. The first limb of this argument is that the order passed by the Executing Court in E. A. No.11 of 1976 is binding on the plaintiff Gopal Krishna as well and it is not open to him to file a separate suit after the dismissal of the E.A. filed by Nazimuddin. The underlying basis of this argument is that Nazimuddin who was the applicant in E.A. No.11 of 1976 is or shall be deemed to be the representative of Gopal Krishna. Having regard to the pleadings and the evidence and the scope of the application in E. A. No.11 of 1976, we find it difficult to countenance this argument. The learned counsel for the appellants wants to seek reliance on the statement in paragraph 3 of the plaint that the plaintiff left for Adilabad in the year 1959 'leaving the suit land in the custody and care of one Syed Nazimuddin' coupled with the deposition of Nazimuddin examined as P.W.5 that the plaintiff asked him to 'supervise' the land, while leaving Adilabad. But, as rightly pointed out by the learned trial Judge, Nazimuddin did not say a word in the E.A. filed by him about his being in possession of the adjacent plot belonging to Gopal Krishna at the instance and on behalf of Gopal Krishna. Nazimuddin claimed title to a part of the suit land in his own right. He merely stated in the application that he was also in possession of the adjacent vacant plot which was of no use to the vendor. There was no specific mention of Gopal Krishna or he being the 'custodian' of the suit plot on behalf of Gopal Krishna. It was only in the course of oral evidence that some attempt was made to explain that his possession of the suit plot was on behalf or at the behest of Gopal Krishna. That apart, it may be seen that the subject-matter of E.A. no.11 of 1976 was a smaller plot of land claimed by Nazimuddin. there could not have been an adjudication in E.A. No.11 of 1976 in respect of the suit plot. Therefore, it cannot be said that Nazimuddin was representing the plaintiff in E. A.No.11 of 1976 or espousing the cause of the plaintiff.

9. The next limb of the argument based on Rule 99 to Rule 101 of Order 21 C.P.C., is that in a situation contemplated by Order 21, Rule 99, C.P.C., the procedure laid down therein has to be necessarily followed and it is not open to the person dispossessed to file a separate suit in view of the bar contained in Rule 101. In other words, it is contended by the learned counsel for the appellants that after the amendment of Order 21, Rule 101 by the C.P.C. Amendment Act, 1976, the resort to suit is altogether barred and the application under Order 21, Rule 99 and the appeal under Rule 103 are the exclusive remedies available. We find it difficult to accept this contention. We agree with the learned Single Judge that the bar against filing of a separate suit would apply only if there was an application under Rule 99 but not otherwise. The third party aggrieved by dispossession in execution of a decree, may make an application to the Court complaining such dispossession. If he makes such an application, all questions including questions relating to right, title and possession in the properties shall be decided in that application as if it were a full-fledged suit for title and possession and no separate suit would lie for this purpose. However, an appeal lies under Rule 103 as if the order passed on such application is decree. We are unable to visualise the provisions of Rules 99 to 101 even after amendment as laying down an exhaustive Code on the remedies of the third parties dispossessed in execution of a decree for possession. The remedy under Order 21, Rule 99, C.P.C. is no doubt one of the remedies available to the person dispossessed. But, we are unable to construe Order 21, Rule 99 as placing a bar on bringing an independent suit for possession, without filing an application under the said Rule. Such a bar, in our view does not arise even by necessary implication.

10. No doubt, there is a qualitative change in the scope of determination after the amendment of 1976 and it is no longer a summary proceeding to determine the question of

possession but it embraces within its scope all questions relating to right, title and interest in the property. But, this change, by itself, does not deprive the aggrieved person of the resort to ordinary civil suit. Apart from the expression 'may' employed in Rule 99 - which prima facie denotes that the remedy under Rule 99 is not compulsive, there is one relevant consideration which weighed with us in coming to the conclusion that the suit is not intended to be barred. The limitation prescribed for filing an application of the nature contemplated by Order 21, Rule 99 is as short as 30 days. It is not uncommon that the dispossession might often take place in the absence and without the knowledge of the person in possession. The person in possession may be residing at a distant place or in a different country. In such a situation, it is hard to visualise that the legislative intent was to deny the remedy on the expiry of 30 days. Whether 30 days' time has to be computed from the date of knowledge of dispossession and what is the date of knowledge would evoke controversies. All these considerations have impelled us to concur with the view expressed by the learned Single Judge and to hold that the suit is not barred."

24. From the above, the learned counsel for the respondents contends that the said Division Bench has clearly taken a view that Order 21 Rule 99 of the Code of Civil Procedure does not place a bar on bringing an independent suit for possession without filing an application under the said Rule.

25. The learned counsel for the respondents also referred to a Full Bench judgment of the Karnataka High Court in **V. K. Rama Setty vs. A. Gopinath**, AIR 1998 Kant. 186, wherein in paragraph 10 this issue has

been considered as under:-

"10. We are of the view that keeping in view the language employed in Order XXI, Rule 99 it is optional for a person, who is other than judgment-debtor and has been dispossessed, to make an application to the Court complaining of such dispossession. Under Rule 99 the use of word 'may' gives an option to a person to file application before the executing Court averring his grievance. But this rule does not make his remedy exhaustive thereby debarring him from preferring a suit for possession completely. It will be for him to choose either of the two forums. This explains the observation of the Division Bench. The Division Bench had not pronounced that even if an aggrieved person prefers an application under Rule 99, then still he will have a right to file a separate suit as well. We are clearly of the opinion that drawing of any such inference is a misreading of the judgment of the Division Bench since such an inference will be in the death of Rule 101 of Order 21, C.P.C. and therefore the same cannot be held to be good law, if at all it was intended to be so laid down. We do not find it necessary to record any detailed reasoning of our own on the said aspect since in our opinion, the issue is now finally concluded by the judgment of the Supreme Court in the case of **Noorduddin vs. Dr. K.L. Anand**, (1995) 1 SCC 242 : (1994 AIR SCW 5093)."

Finally, in the said judgment, the Full Bench has observed in paragraph 13, that once an application is filed by the aggrieved person either under Rule 97 or Rule 99, then Rule 101 in an unambiguous term bars filing of a separate suit on any questions arising between the parties, including the question relating to right, title

and interest in the property.

26. Therefore, the contention of the learned counsel Shri Nadkarni is that in the instant case the respondents have not filed any application either under Order 21 Rule 97 or under Order 21 Rule 99 of the Code of Civil Procedure, hence if that be, the respondents cannot be prevented from filing a separate suit. To put it in other words, Shri Nadkarni contends that a separate suit is barred only if an application has already been filed and is pending and not otherwise. In the instant case, as the respondents have not filed an application either under Order 21 Rule 97 or under Order 21 Rule 99 of the Code of Civil Procedure, the suit filed by them in 2000 is very much entertainable and is not barred.

27. Shri Nadkarni, therefore, points out that the judgments of the Supreme Court do not very specifically deal with this issue in the sense whether a suit is barred after filing of an application under Order 21 Rules 97, or 99 of the Code of Civil Procedure, or otherwise, whereas the learned counsel for the respondents contends that the aforesaid two judgments of the High Courts, namely of Andhra Pradesh and Karnataka deal with this very specific issue, namely that the bar can come in only if there is already an application under Order 21 Rule 97 or Order 21 Rule 99 of the Code of Civil

Procedure and if there is no such application, then there is no question of any bar in filing such a suit. In the light of the above, Shri Nadkarni contends that the learned Civil Judge, Senior Division, Margao, was absolutely right in rejecting the application of the petitioners seeking rejection of the plaint under Order 7 Rule 11 of the Code of Civil Procedure.

28. After having considered the arguments of both the sides in depth, it is clear that in 1976 certain amendments were brought to the Code of Civil Procedure especially in Order 21, so as to curtail and minimize the prolonged execution proceedings. In fact, the objective of incorporating Order 21 Rule 103 after the said 1976 Amendment was to prevent a separate suit being filed again, as was in vogue earlier. The very objective was that even in an application either under Order 21 Rule 97 or Rule 99 of the Code of Civil Procedure, the Court was empowered to adjudicate the entire dispute by recording evidence and the said adjudication may be construed as a decree. In fact, in this context Rule 101 makes it very clear that the executing Court will have jurisdiction to decide all questions with a non-obstante clause with a specific provision that such an executing court shall be deemed to have jurisdiction to decide all such questions and that there shall be no separate suit. In this context it will be relevant to again quote Rule 101 of

Order 21, which reads as under:-

101. Question to be determined.-

All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

29. While interpreting the provisions of Order 21 Rules 97 to 103 of Code of Civil Procedure in **Noorduddin vs. Dr. K. L. Anand** (supra), the Supreme Court in clear terms has held in paragraph 8 that the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten litigation between the parties or persons claiming right, title and interest in the immovable property in execution. Similarly, in very clear and categorical terms in **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal & Anr.**, (supra), the Supreme Court has held as under, in para 9:-

".....
On the contrary the statutory

scheme envisaged by Order 21, Rule 97 C.P.C. as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21, Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves."

30. It may be very relevant to note that both the aforesaid judgments referred to and relied upon by Shri Nadkarni, the learned counsel for the respondents, i.e. the Division Bench judgment of the Andhra Pradesh High Court as well as the Full Bench judgment of the Karnataka High Court do not at all refer to the judgment of the Supreme Court in **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal** (supra).

31. It may be noted that the Full Bench judgment of the Karnataka High Court refers to the judgment of **Noorduddin vs. Dr. K. L. Anand** (supra) and, in fact, has quoted the same in paragraphs 8 and 9 of the same judgment. However, the said judgment of the Karnataka High Court took a view that such a separate

suit is maintainable.

32. The learned counsel for the petitioners, Smt. Agni, had pointed out that both the aforesaid judgments of the Andhra Pradesh High Court and the Karnataka High Court deal with a case wherein an application under Order 21 Rule 99 of the Code of Civil Procedure has already been filed and in that context both the judgments rule that such a separate suit would not lie.

33. Especially in the light of the facts and circumstances of this case, which has been protracted from the year 1970 by one way or the other, and some party or the other is blocking the execution of the decree, as rightly observed in the case of **Noorduddin vs. Dr. K. L. Anand** (supra), the scheme of the Code appears to put an end to protraction of the execution and shorten the litigation between the parties, or persons claiming right, title and interest in the immovable property and execution. It appears that such a separate suit could not be maintained. This is all the more clear as has been held by the Supreme Court in the case of **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal** (supra), as indicated hereinabove, that a separate suit would be barred with a view to avoid multiplicity of proceedings and parallel proceedings. In the said judgment the

Supreme Court has clearly held that Order 21 Rules 97 to 103 would remain a complete code and a sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves.

34. In the light of the above, I am clearly of the view that especially in view of the observations in paragraph 8 of the judgment of the Supreme Court in the case of **Noorduddin vs. Dr. K. L. Annad** (supra), as well as the law laid down by the Supreme Court in the case of **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal** (supra), in paragraph 9, no separate suit is maintainable, even though no application is filed under either Order 21 Rule 97 or Order 21 Rule 99 of the Code of Civil Procedure, 1908. In view of the above, I do not agree with the view expressed by both the Karnataka and Andhra Pradesh High Courts.

35. The learned counsel for the petitioners, Smt. Agni, fairly stated that the respondents are free to make an application under Order 21 Rule 99 of the Code of Civil Procedure and that the petitioners will not object to the same on the ground of maintainability, but however, they will oppose the same on merits.

36. For the aforesaid reasons, the impugned

Order passed by the learned IInd Additional Civil Judge, Senior Division, Margao, dated 11th January, 2001, cannot be sustained as the error is apparent on the face of the it. For the foregoing reasons, the Civil Revision Application is made absolute in terms of prayer Clause (a), however, with no order as to costs.

S. RADHAKRISHNAN, J.

mc.